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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-96

DANIEL E. DAMON, Superintendent of Elmira Reformatory,
Petitioner,

against

SHELDON LEESON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. _____

DANIEL E. DAMON, Superintendent of Elmira Reformatory,

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against

SHELDON LEESON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in *United States ex rel. Sheldon Leeson* v. *Damon,* entered on April 1, 1974 and as amended upon rehearing on May 13, 1974 (Hays, J., dissenting).

Opinion Below

The District Court's opinion is unreported. It is reproduced as Appendix "A". The opinion of the Court of Appeals for the Second Circuit is reported at 496 F. 2d 718. It is reproduced as Appendix "B".

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1974 and amended on May 13, 1974.

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether respondent's allegation that defense counsel misadvised him as to the sentence he could receive upon his plea to attempted grant larceny in the second degree can invalidate his plea which was freely and voluntarily entered by respondent after consultation with retained counsel whose representation was in all respects adequate and where the state court found that the prosecution would be prejudiced by any withdrawal of the guilty plea?

2. Whether the District Court rather than the New York courts should determine the relief to be accorded respondent upon his allegation that his attorney misadvised him as to the maximum sentence he could receive.

Statement of the Case

In an indictment filed February 3, 1967, the respondent and one Samuel Carville were charged with three counts of forgery in the third degree and three counts of grand larceny in the first degree, in that, on June 24, September 27 and September 30, 1966, they made false entries in a record of accounts and a book of accounts of Hayden, Stone, Inc., and thereby appropriated a total of $12,400 (Indictment No. 496-67).

On September 19, 1967, respondent, represented by retained counsel, Selig Lenefsky, Esq., appeared before Mr. Justice Schweitzer, and offered to plead guilty to the

charge of attempted grand larceny in the second degree to cover all charges in the indictment (Minutes of September 19, 1967, p. 2). The following colloquy took place:

> "The Court: By your pleas of guilty do you admit that in New York County, between June 24, 1966, to on or about October 30, 1966, you with intent to deprive or degrade (sic) another stole certain property owned by Haid & Stone (sic), Inc., having an adequate (sic, should be 'aggregate') value in excess of $5,000, that is certain checks, and did you effect such theft by making a false and fraudulent representation as set forth in the fourth count in the indictment to one of the employees of Haid & Stone, Inc., to wit, that there was an equity in the account of one Samuel Carvel (sic), equal to and in excess of the amount of the checks which you stole. Did you commit those acts?
>
> The Defendant: Yes. I did.
>
> The Court: Now, 'did you at the time that you made these representations and presences (sic), know that they were false, and did you make them for the purpose of having Haid & Stone rely upon those representations?
>
> The Defendant: Yes, sir.
>
> The Court: And did you at that time know that there was not an equity in the account of Samuel Carvel equal or in excess of the amount of the checks? You knew that there was no such equity, is that right?
>
> The Defendant: Yes.
>
> The Court: Now, has anyone given you any promise as to what sentence I would impose upon you in order to induce you to enter this plea of guilty?
>
> The Defendant: No, sir." (Id., pp. 2-3)

The plea was accepted, and, at the request of counsel, sentence was postponed so that the court, at sentence, could consider a forthcoming Nassau County indictment against the defendant (Id., pp. 4-5).

After the respondent entered his guilty plea, the People in reliance thereon recommended that the case against the co-defendant be dismissed. In the dismissal recommendation, the People revealed that the loss to Hayden, Stone, Inc. was discovered by an audit taken on September 30, 1966, and that the respondent had made a confession to the officers of Hayden, Stone, Inc., the recommendation setting forth the substance of that confession, and the other evidence against Leeson.

Two months later, in a letter to Mr. Justice Schweitzer, dated November 30, 1967, the respondent requested that he be permitted to withdraw his guilty plea. He stated that the reason for his request was that "Mr. Lenefsky [who 'forgot how young I am'] promised me that my maximum sentence would be 1.3-2.6 years. This would be inclusive of all my other cases." He complained that the court "insist[s] on sentencing me to Elmira Reformatory." However, he then claimed:

> "Right now I do not even want the 1.3-2.6 sentence. I only copped out because I felt that my other cases were hopeless. I find that they are far from hopeless, and in all likelihood I will beat them. • • • I only took the plea because Mr. Lenefsky promised that all my cases would be thrown into the Att. Grand 2 sentence."

On January 22, 1968, the respondent, represented by Mr. Lenefsky, appeared before Justice Schweitzer for a hearing on his motion (Minutes of January 22, 1968). Respondent testified that he was 23 years old, and that prior to the entry of his plea, he spoke to Mr. Lenefsky and asked what sentence he was facing, that Mr. Lenefsky said he was facing one year and three months to two years and six months (Id., pp. 2-3). He testified that he assumed that Mr. Lenefsky had an assurance from the court, but he did not ask if he had such an assurance (Id., pp. 8-9). He stated that, after he had entered the plea, Mr. Lenefsky

told him that he had overlooked the fact that petitioner was still eligible to be sentenced to Elmira Reformatory since he was still under 30 (Id., p. 3).

Leeson said that he was not guilty of the crime he pleaded guilty to, and that he had pleaded only for the sake of expedience (Id., pp. 9-10).

Justice Schweitzer rejected respondent's explanation for his guilty plea. *Inter alia,* he noted that respondent claimed that "he copped out because I felt that my other cases were hopeless" and that he disclaimed that he was guilty of the charges in the indictment. On the contrary, Justice Schweitzer found that the respondent had specifically acknowledged the commission of the criminal acts and that his claim of innocence was additionally belied by incriminatory admissions in his pre-sentence report. The state court judge held that substantial prejudice would inure to the People's case if withdrawal of the guilty plea were permitted, since it had altered its position by filing a recommendation for dismissal of the indictment against the co-defendant.

On February 5, 1968, respondent was sentenced to the Elmira Reformatory for a term not to exceed five years.* Respondent completed service of this sentence on September 2, 1972 and is no longer under any form of restraint.

Respondent appealed his conviction to the Appellate Division, First Department claiming that (1) he was misadvised by counsel as to the sentence he would receive and should have been permitted to withdraw his guilty plea and (2) that it was error for the court to permit Selig Lenefsky, his prior counsel, to represent him at the hearing on his motion to withdraw his plea.

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* According to the records of the New York State Board of Parole respondent was paroled on August 26, 1969, approximately one year and seven months after sentencing.

The Appellate Division affirmed on October 14, 1969, 33 App. Div. 2d 656. Leave to appeal to the New York Court of Appeals was granted. The judgment was unanimously affirmed, 27 N Y 2d 680 (1970). ["The People argued that the denial of the motion did not constitute an abuse of discretion since, even if the erroneous sentence prediction allegedly made by defendant's counsel had induced the guilty plea, it did not entitle the defendant to withdraw the plea, on reliance upon which the People had altered its position and exposed its evidence."]

By petition dated August 21, 1972, respondent instituted an application for a federal writ of habeas corpus claiming that his plea was unconstitutional since his attorney had allegedly misadvised him as to the sentence he might receive upon his plea of guilty to attempted grand larceny in the second degree.

The District Court held that respondent did not present the constitutional issue that his plea was unknowingly and involuntarily entered to the state court and denied respondent's application for failure to exhaust available state remedies.

The Second Circuit (Hays, J., dissenting) reversed the order of the District Court holding that respondent's plea was invalid since it was entered in ignorance of its direct consequences. Upon reargument, the Circuit Court left to the District Court, the task of determining whether the plea should be vacated or whether respondent should be given the sentence he alleged he believed to be the maximum. Judge Hays, in his dissent, held that respondent's counsel was not so ineffective as to raise a constitutional issue.

Reasons for Granting the Writ

I.

The Circuit Court applied an incorrect standard in assessing the validity of respondent's plea.

This case illustrates a continuing effort in the Second Circuit to downgrade the effect of the guilty plea, such as was entered at bar. See, *Lefkowitz* v. *Newsome, cert. granted* June 17, 1974. No. 73-1627.

Here there is absent any claim that the prosecution [or the court] had made any representation as to sentence as in *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495 (1971), but simply a *claim* by the defendant that his attorney had been mistaken as to the prospective sentence and that he had entered the guilty plea based upon the attorney's advice.

We submit that if plea bargaining, the importance of which this court recognized in *Santobello*, is to have any continued viability, the free and easy attitude toward the state court guilty plea resulting from the plea bargaining must be cut off by this Court.*

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* In *Mosher* v. *La Vallee*, 491 F. 2d 1346 (2d Cir. 1974), cert. den. —— U.S. —— (1974), the defendant claimed his attorney told him that the state judge had promised the specific sentence. The Second Circuit said the case was "unique" and raised the question of effective assistance of counsel. Despite the belief that the situation was "unique", this was promptly followed by *U.S. ex rel. Oliver* v. *Vincent*, —— F. 2d —— (2d Cir., June 3, 1974, No. 73-2246), involving a claim of "his attorney's false assurances that an agreement had been reached for the imposition of a more favorable sentence" in which the Second Circuit said the *Mosher* case rendered "any discussion of the governing principles and other cases superfluous." It is obvious that, as indicated above, there is being spawned a flow of cases challenging the guilty plea based on a defendant's asserted assurances from his attorney, which are claimed to have turned out as mistaken.

Here, respondent's claim that his plea was entered on a misunderstanding as to the maximum possible sentence he could receive relates only to the alleged failure of his trial attorney to inform him that he could alternatively be sentenced to a five year reformatory term because of his age. It is undisputed that neither the prosecutor nor the trial court made any sentence representations which were not met. In this posture, the validity of respondent's plea should be assessed in terms of the competency of his trial counsel and whether the representation accorded respondent was such as to shock the conscience of the Court and render the proceedings a farce or mockery of justice and not pursuant to the voluntarily and knowingly entered standard set forth in *Kercheval* v. *United States*, 274 U.S. 220 (1927) and relied upon by the Circuit Court.

Although this Court has never ruled on the precise standard to be applied in assessing the validity of a plea entered after alleged misadvice by a defendant's own trial counsel as to the maximum punishment he faced upon his conviction, the approach of the Second Circuit in the case at bar conflicts with the reasoning of this Court in *McMann* v. *Richardson*, 397 U.S. 759, 775 (1970), where this Court stated:

> "It is no denegation of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further he assumes that risk of ordinary error in either his or *his attorney's assessment of the law* and facts . . . he is bound by his plea unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all a knowing and intelligent act." (Emphasis supplied)

The Second Circuit, in applying *Kercheval*, has established a blanket rule which ignores the fact that a defendant frequently pleads guilty for many reasons other than sentence

and that a defendant's interaction with his attorney is an ongoing relationship in which all aspects of a case are discussed. During such discussions, an attorney obviously would emphasize those aspects of a case about which his client is most concerned and under such circumstances, a failure to advise as to an alternative sentencing provision must be assessed in the light of the overall effectiveness of the representation otherwise accorded a defendant. Presumptively, defense attorney's interest in a case is coextensive with his client's interest and there is thus no reason to apply the more stringent standard of *Kercheval* to the set of facts at bar.

We believe certiorari should also be granted in the instant case since the Third, Fifth, Seventh and District of Columbia Circuits have analyzed claims similar to that raised by respondent in terms of the overall competency of the defense and thus are in conflict with the Second Circuit decision herein. *Smith* v. *United States*, 324 F. 2d 436 (D.C. Cir. 1963); *Georges* v. *United States*, 262 F. 2d 426 (5th Cir. 1959); *United States* v. *Shneer*, 194 F. 2d 598 (3d Cir. 1952); *United States* v. *Searle*, 180 F. 2d 209 (7th Cir. 1950).

Moreover, even within the Second Circuit, the decisions are conflicting. Thus, in *United States* v. *Horton*, 334 F. 2d 153 (2d Cir. 1964), the defendant sought to invalidate his plea on the ground that defense counsel had represented that the Assistant United States Attorney would recommend a sentence shorter than the possible maximum, although the established rule in the Second Circuit is that the federal prosecutor may not make a sentence recommendation. The Second Circuit held that, notwithstanding this erroneous sentence advice by defense counsel, this was insufficient to entitle the petitioner to withdraw his plea.

> "It has recently and we think correctly said that erroneous advice by defense counsel as to sentence does

not support attack under § 2255 unless it amounts to ineffective assistance of counsel of such kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." *United States* v. *Horton, supra,* 153.

In *United States ex rel. Scott* v. *Mancusi,* 429 F. 2d 451 (2d Cir. 1971), the petitioner sought to invalidate his plea on the grounds that defense counsel erroneously informed him prior to his plea that it could be withdrawn at any time. Defense counsel erred since the plea was subject to withdrawal only upon approval of the trial court. The Second Circuit stated:

> "Although it is surprising that counsel would not be aware of the governing New York Statute, his conduct was not such as would 'shock the conscience of the Court and make the proceedings a farce and mockery of justice' . . . See also, *United States ex rel. Maselli* v. *Reincke,* 383 F. 2d 129, 132 (2d Cir. 1967) where it is stated that for there to be a lack of compliance with the fundamental fairness essential to due process counsel's representation must be so 'horribly inept as to amount to a breach of his legal duty faithfully to represent his client's interest . . .' The present case is a long way from meeting the tests set out above."

Additionally, the Circuit Court improperly and unfairly ignored the fact that the People would be substantially prejudiced, as the state court found, because the People had already filed a recommendation for dismissal of charges against respondent's codefendant in which its entire case had been revealed. *U.S.* v. *Del Valle Rojas,* 463 F. 2d 228 (9th Cir. 1972), *U.S.* v. *Harvey,* 463 F. 2d 1022 (4th Cir. 1972), *cert. den.* 411 U. S. 972.

This fact weighed heavily in the trial court's determination, upheld by the state appellate courts, to deny respondent's request to withdraw his plea.*

The Circuit Court invaded the function of the state courts on question of discretion which is a matter of state law, not normally reviewable by federal habeas corpus *Lisenba* v. *California*, 316 U.S. 19, 228 (1941).

Respondent at bar took the best choice open to him—to plead to attempted grand larceny in the second degree. The People had a strong case, the defendant having admitted his guilt. He has never alleged that he had any defenses to the charges and respondent's allegation that his attorney overlooked an alternative sentencing provision is not sufficient to invalidate his plea.

Since collateral relief is available to state prisoners many years after conviction, especially where a defendant is attacking a predicate conviction which is serving as a basis for multiple offender treatment, we believe that the issue raised herein merits the plenary consideration of this Court.

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* In *Santobello*, Justice Marshall said (404 U.S. 268-269): "It is worth nothing that in the ordinary case where a motion to vacate is made prior to sentencing, the Government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal. More pointedly, here the State claims no such harm beyond disappointed expectations about the plea itself. At least where the government itself has broken the plea bargain, this disappointment cannot bar petitioner from withdrawing his guilty plea and reclaiming his right to a trial."

II.

The decision of the Circuit Court which permits the District Court to determine whether respondent's plea should be vacated or whether he should be given the maximum sentence he alleges he believed he could receive was improper.

While the important consideration on this application is the challenge to the plea of guilty on subjective testimony as here, there is a further collateral improper assumption of authority by the Circuit Court. That court, after reargument, remanded this case to the District Court to fashion relief appropriate under the facts and circumstances, leaving it to the District Court to determined whether to invalidate the plea or impose a maximum sentence of 2.6 years on respondent. However, respondent was a state prisoner attacking a state conviction,* and such a remand to the District Court conflicts with *Santobello,* 404 U.S. at 263, where this Court remanded to the state courts for further consideration, leaving the ultimate relief to be accorded to respondent in that case to the discretion of the state court.

Since upon a state conviction, the extent of punishment is for the State tribunal, it was a violation of principles of comity to remand to the District Court for the fashioning of relief.

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* Respondent instituted his federal habeas corpus application on August 21, 1972, approximately two weeks before his five year term concluded on September 2, 1972.

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should be granted and the judgment of the Court of Appeals summarily reversed or plenary argument ordered.

Dated: New York, New York, August 8, 1974.

Respectfully submitted,

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Appendix A, District Court Opinion Denying Writ.

UNITED STATES DISTRICT COURT
SOUTHERN OF NEW YORK

72 Civ. 3603

MEMORANDUM AND ORDER

UNITES STATES ex rel. SHELDON LEESON,

Petitioner,

—against—

DANIEL E. DAMON, Superintendent of Elmira Reformatory, Elmira, New York and THE NEW YORK STATE DIVISION OF PAROLE,

Respondent.

Brieant, J.

Petitioner, a state prisoner, seeks a writ of habeas corpus. He was convicted in Supreme Court, New York County on February 5, 1968, upon his plea of guilty of the crime of attempted grand larceny in the second degree. He was sentenced to a reformatory term, in Elmira Reformatory not to exceed five years, with possibility of earlier parole, pursuant to § 2185 of the New York Penal Law of 1909, then in effect.

On August 26, 1969, approximately one year and seven months after sentencing, petitioner was paroled. On September 2, 1972, he completed service of his reformatory sentence. This petition was filed August 23, 1972, and a hearing held October 20, 1972.

Petitioner duly moved before the state Justice who had accepted his plea of guilty, for permission to withdraw the plea. The state court held a hearing, and made findings of fact. The issue presented to the state court by

petitioner at that hearing was that he had pleaded guilty in reliance on an erroneous sentence prediction by his own, privately retained counsel, to which the court was not a party. His attorney had told him that he was subject to the maximum possible penal sentence for the crime to which he pleaded, this sentence being not less than one year and three months, and not more than two years and six months. There was no question of any promise from the court or prosecutor, because under the law the court had no power to impose a more severe penal sentence on the plea. His attorney had said to him that he would get no more than that sentence, which was the maximum the law permits.

The state court correctly held after the hearing that this sort of prediction, made solely by petitioner's retained counsel, without the participation of any person in official capacity, the District Attorney or the Court, was not a basis for withdrawing the guilty plea. A judgment to this effect was affirmed by the Appellate Division on October 14, 1969 (33 App.Div.2d 656) and leave to appeal to the New York Court of Appeals was granted and the judgment affirmed, (27 N.Y.2d 680).

The sole issue determined by the state courts was whether the erroneous sentence estimate by defense counsel rendered the plea involuntary. *U.S. ex rel. LaFay* v. *Fritz,* 455 F.2d 297 (7th Cir. 1972).

Allegedly, at the time of the plea, petitioner's then attorney overlooked the fact that petitioner was then aged 23 and could be sentenced alternatively to a reformatory term in Elmira pursuant to the aforementioned statute. This, in fact, was the sentence imposed.

There is now tendered the greater and different issue of whether petitioner knew, from his lawyer or any other source, that he was facing, alternatively, a five year reformatory sentence to Elmira, and whether he would have entered the plea if he had known. Accordingly, the constitutional question now is whether petitioner's plea was made "with full understanding of the consequences"

(*Kercheval* v. *United States*, 274 U.S. 220, 223). Guilty pleas are now valid only if both voluntary and intelligent. Otherwise, acceptance of a guilty plea violates due process. *Brady* v. *United States*, 397 U.S. 742, 747 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970).

The parties before me urge that no evidentiary hearing need be held. Respondent urges that the issues of fact have been fully litigated in the state court and that pursuant to 28 U.S.C. § 2254(d) and *U.S. ex rel. Preston* v. *Mancusi*, 422 F.2d 940 (2d Cir. 1970) we should presume the state court's conclusions in this regard are correct. Petitioner says that the state record, and the uncontradicted affidavit of the attorney who represented petitioner at the time of the plea, require the writ be granted.

It appears that the constitutional issue as now tendered has not been determined by the state court. Accordingly, state remedies have not been exhausted.

As stated in *United States ex rel. Figueroa* v. *McMann*, 411 F.2d 915 (2d Cir. 1969) at page 916:

> "When a state prisoner presents a materially different claim and stronger evidentiary case before the federal court in a habeas corpus petition, and a state forum is available to consider the additional factors and varied claim, the federal court should properly dismiss the petition before it. United States ex rel. Boodie v. Herold, 349 F.2d 372 (2 Cir. 1965); United States ex rel. Kessler v. Fay, 232 Supp. 139, 142 (S.D.N.Y. 1964); United States ex rel. Scarnato v. Fay, 347 F.2d 424 (2 Cir. 1965). Nothing in Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed. 2d 41, reversing United States ex rel. Roberts v. LaVallee, 373 F.2d 49 (2 Cir. 1967), requires a different result here."

Further, as stated in *Clark* v. *Nickeson*, 321 F.Supp. 415 (D.Conn. 1971), citing authority:

> "'[W]here the federal habeas court is unable to determine unequivocally that an issue has been consid-

> ered and ruled upon by the state courts, comity requires us to 'put the fact finding and law finding responsibility squarely on the *** [state courts] where, initially at least, it belongs.' Spencer v. Wainwright, 403 F.2d 778 (5th Cir. 1968). Williams v. Wainwright, 410 F.2d 144, 145 (5th Cir. 1969), cert. denied, 398 U.S. 943, 90 S.Ct. 1846, 26 L.Ed.2d 281 (1970)."

The issue must be "properly presented." *Daniels* v. *Slayton,* 327 F.Supp. 701 (W.D.Va. 1971). There is a vast difference between reliance on an erroneous sentence prediction in taking a plea, and the taking of a plea other than voluntarily, intelligently and with full knowledge of the consequences. Here, that latter issue was never "properly presented" in state court.

Accordingly, the petition is denied for failure to exhaust state remedies, without prejudice to renewal by application in the nature of *coram nobis,* to the state court based upon the same constitutional claims set forth in the petition herein.

So Ordered.

Dated: New York, New York
October 27, 1972

CHARLES L. BRIEANT, JR.
CHARLES L. BRIEANT, JR.
U. S. D. J.

Appendix B, Opinion, United States Court of Appeals, Second Circuit.

UNITED STATES ex rel. Sheldon LEESON, Appellant,

v.

Daniel E. DAMON, Superintendent of Elmira Reformatory, Appellee.

No. 670, Docket 73-2597.

United States Court of Appeals, Second Circuit.

Argued Jan. 22, 1974.

Decided April 1, 1974.

As Amended on Rehearing May 13, 1974.

Gretchen White Oberman, New York City, for appellant.

Arlene Silverman, Asst. Atty. Gen., (Louis J. Lefkowitz, Atty. Gen. of N. Y., Samuel A. Hirshowitz, First Asst. Atty. Gen., of counsel), for appellee.

Before HAYS, MANSFIELD and OAKES, Circuit Judges.

OAKES, Circuit Judge:

Appellant appeals from the denial of a writ of habeas corpus under 28 U.S.C. § 2254. As a state prisoner, he was convicted in Supreme Court, New York County, on September 19, 1967, upon a plea of guilty to the crime of attempted grand larceny in the second degree. His maximum punishment for attempted grand larceny, second degree, was a term of 1.3 to 2.6 years' imprisonment.

NYPL §§ 261, 1297.[1] Unbeknownst to appellant at the time the plea was entered, as a first offender who was under 30 years of age he was also subject to the indefinite five-year reformatory term at Elmira provided for in Penal Law § 2185. On November 30, 1967, before sentence was imposed, appellant wrote to the judge, Justice Mitchell D. Schweitzer, who had accepted the plea, asking to withdraw it. He stated in the letter that his attorney "forgot how young I am" and had informed him "that my maximum sentence would be 1.3-2.6 years." Appellant stated that he was not guilty of the crime and that "I only took the plea because [my attorney] promised that all my cases[2] would be thrown into the att. Grand 2 [sic] sentence," that is to say, the sentence for attempted grand larceny in the second degree. The letter was treated by Justice Schweitzer as a pro se motion to withdraw the plea and a hearing was held.

At this time in the New York criminal procedure, it should be noted, there was no obligation on the part of the

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[1] This case arose before the revised New York Penal Law in 1967 took effect. While the conviction and sentencing occurred after the new Penal Law took effect, they were governed by the old law. NYPL § 5.05, subd. 3 (1967). Thus, the statutory references herein are to the New York Penal Law of 1909. PL § 1297 set the term of imprisonment for grand larceny, second degree, at a maximum of five years. PL § 261 specified that one convicted of an attempt must be sentenced to a maximum of "not more than one-half" of the largest sentence prescribed on conviction for the offense attempted. Under PL § 2189 the court was empowered to set a minimum term of no greater than one-half of the prescribed maximum or in this case no greater than one year and three months. Under the present law appellant's maximum imprisonment would have been one year. NYPL §§ 70.15, subd. 1, 110.05, subd. 5, 155.30.

[2] Appellant had been indicted on three counts of forgery in the third degree, and three counts of grand larceny in the first degree. His guilty plea to grand larceny in the second degree was to cover all charges. In addition, appellant had been indicted in Nassau County for another crime; he subsequently went to trial on the Nassau County indictment and the case against him was dismissed.

judge accepting a plea similar to the obligation imposed upon federal judges by virtue of Fed.R.Crim.P. 11 to make sure that the person pleading guilty does so "with understanding of . . . the consequences of the plea." Rather, as the State has conceded on argument, the sole obligation for advising the person pleading guilty as to the consequences of his plea rested on his attorney. Accordingly, there is nothing in the record to show that in any way the court accepting the plea advised the appellant as to its consequences. The state court hearing on the motion to withdraw the plea of guilty, then, turned on what the appellant's attorney had told him prior to the entry of the plea; the only evidence in the hearing was that the attorney had told him that he was facing at most a one year and three months minimum and two years and six months maximum, and that he had not advised Leeson that—indeed, that he had overlooked the fact that—appellant was of an age where he could "get Elmira", *i. e.*, receive the indefinite five-year reformatory sentence to Elmira. Again, on cross-examination by the assistant district attorney, appellant stated that the only sentencing alternatives that he was told about by his attorney were that he "could get completely cut loose, I could get put on probation, I could get one month's term, or one-three to two-six."[3] He also denied his guilt and said that he pleaded guilty to a crime which he did not commit to get everything over and done with. The sentencing judge denied relief on the basis that "[t]he defendant's insistence that he was advised incorrectly by his own lawyer as to the sentence that he believed the court would impose can in no way bind the court in the absence of a showing that the court joined in such promises." The sentencing judge thus conceived this—erroneously, we feel—as a case of an unwarranted assurance by counsel, rather

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[3] The value of the federal rule, in making sure that the record contains a defendant's statement showing his knowledge of the circumstances, is self-evident, in the light of this case.

than a case of lack of knowledge of the consequences of the plea.

Appellant appealed to the Appellate Division and then secured leave to appeal to the New York Court of Appeals, the basis for his argument being, as the briefs show, that the plea should be vacated because it was made in ignorance of the direct consequences of the conviction and that it was therefore not voluntarily entered in the constitutional sense. Both state appellate courts affirmed the conviction without opinion, so that there is no question but that appellant has exhausted his state remedies. District Judge Brieant below misconstrued this issue, probably because the briefs which were submitted to the Appellate Division and the Court of Appeals were not submitted to him at the time of the filing of the petition for habeas corpus. Thus, he incorrectly held that the constitutional issue as now tendered had not been determined by the state courts, relying on United States ex rel. Figueroa v. McMann, 411 F.2d 915, 916 (2d Cir. 1969), and he denied the petition.

The substantive facts, however, were called to the attention of the state trial court, and the issue was raised there though perhaps not as precisely as it was subsequently on appeal. On review the Appellate Division has the duty of reviewing the appellate record in determining whether errors had been preserved so as to warrant reversal "upon the facts" or "in the interests of justice," *see* NYCPL § 470.15, and the question was raised in the brief there.[4] Finally, the issue was spelled out plainly on page 5 of the appellant's brief before the Court of Appeals: "It is our contention on this appeal that appellant's plea, en-

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[4] On page 10 of appellant's brief to the Appellate Division, First Department, it was stated: "appellant should have been allowed to withdraw his plea as not having been voluntarily entered in the constitutional sense. Machibroda v. United States, 368 U.S. 487, [82 S.Ct. 510, 7 L.Ed.2d 473] (1962)."

tered as it was out of ignorance of its direct consequences, cannot be considered voluntary in the constitutional sense [Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009]. . . ." As our cases evince, where the record shows that a state prisoner has raised an issue on appeal, then a proper exhaustion of state remedies has taken place, irrespective of whether an appellate opinion has been written indicating this fact. United States ex rel. Ross v. LaVallee, 448 F.2d 552, 554 (2d Cir. 1971); United States ex rel. Cardaio v. Casscles, 446 F.2d 632 (2d Cir. 1971); United States ex rel. Williams v. Zelker, 445 F.2d 451, 454-455 (2d Cir. 1971).

All that is required by Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438, 455 (1971), is that the state courts must have had a "fair opportunity" to consider a constitutional claim before federal habeas is available under the exhaustion doctrine. Here clearly both the Appellate Division and the Court of Appeals had such an opportunity.

Moreover, no state collateral remedy would be available in the event he were held not to have raised the question on appeal since under the New York Criminal Procedure Law, § 440.10, subd. 2(c), a motion to vacate a judgment must be denied where sufficient facts appear in the record to have permitted adequate appellate review of an issue where the issue was not raised on appeal.

On the merits, this is not the kind of case that apparently the sentencing judge thought it was, that is to say, where a guilty plea was based on an erroneous prediction about sentence given by counsel. *See, e. g.*, United States ex rel. Bullock v. Warden, Westfield State Farm for Women, 408 F.2d 1326, 1330 (2d Cir. 1969), cert. denied, 396 U.S. 1043, 90 S.Ct. 688, 24 L.Ed.2d 686 (1970). Rather it is a case where the undisputed proof before the trial judge is that the defendant entered his plea in ignorance of what the maximum *possible* sentence was, believing it to be substantially

less than that which the court was authorized to impose and which, indeed, it did impose.

It is settled law that a defendant who pleads guilty to a charge must do so "with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927). *See also* McMann v. Richardson, 397 U.S. 759, 766, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). As was explained in McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969) (emphasis added; footnotes omitted):

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and *knowing,* it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses *an understanding of the law* in relation to the facts.

Upon the facts in this case, appellant's plea was not knowing and was without an understanding of the law inasmuch as he did not know the maximum possible sentence he might receive. It is thus a plea entered in ignorance of its direct consequences, and it is therefore invalid. *See* Marvel v. United States, 380 U.S. 262, 85 S.Ct. 953, 13 L.Ed.2d 960 (1965) (per curiam); Wells v. United States, 452 F.2d 1001, 1003 (5th Cir. 1971); Wade v. Wainwright, 420 F.2d 898 (5th Cir. 1969); Kotz v. United States, 353 F.2d 312, 314 (8th Cir. 1965); Matthews v. United States, 308 F.Supp.

456 (S.D.N.Y. 1969); McCullough v. United States, 231 F. Supp. 740 (N.D.Fla. 1964). *Kotz, Matthews* and *McCullough* are particularly pertinent to the case at bar for they involved instances, albeit under federal law, where the defendants could be sentenced under the Youth Corrections Act to terms longer than if sentenced as adults, and where they alleged they were not aware of this possibility prior to their plea. These courts held that if the defendants did not know of their possible sentences under the Youth Corrections Act, then the acceptance of the pleas would be a violation of the due process clause.

It is unnecessary to remand this case for a hearing to determine whether appellant did not know his maximum possible sentence, for the appellant's contentions as to his ignorance are not disputed by the State. Moreover, appellant's original counsel has submitted an affidavit which supports appellant's own version of the facts with which, indeed, as we view it, the sentencing judge did not disagree.

Before the sentencing judge the State urged that the plea should not be allowed to be withdrawn because the State would be prejudiced by reason of its dismissal of a codefendant's indictment after the plea. Whatever weight this argument might have when addressed to a court's discretion, it has none when the issue is whether a waiver of a constitutional right has been made unknowingly, which is a question of law, not a balancing of equities. *Cf.* United States v. Pisacano, 459 F.2d 259, 262 (2d Cir. 1972). *See also* ABA Standards Relating to Guilty Pleas, Approved Draft (1968) § 2.1 and commentary, pp. 57-58. It is also of no moment that the appellant is no longer confined "actually or constructively" since the writ was filed while he was still being detained on parole by the State pursuant to the state court judgment and his unconditional release thereafter did not render his case moot. Carafas v. LaVallee, 391 U.S. 234, 237-240, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). *See also* United States ex

rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971).

We leave to the district court on remand the task of fashioning relief appropriate under all of the facts and circumstances. Granting the writ would, of course, permit appellant to withdraw his plea of guilty and to plead not guilty, but the State would presumably be able to bring him to trial on the offense charged, even though he has already served time in the Elmira Reformatory therefor. Alternatively, this may be another case like Mosher v. Lavallee, 491 F.2d 1346 (2d Cir. 1974), where the district court might grant the option of requiring that appellant be given the sentence he thought was the maximum, 1.3-2.6 years' imprisonment. A hearing may be appropriate to make this determination.

Reversed and remanded for proceedings consistent with this opinion.

HAYS, Circuit Judge (dissenting).

I dissent.

The conduct of Leeson's counsel was not so ineffective as to raise a constitutional issue. The circumstances of Leeson's conviction and sentence are not such "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice," the standard applied by this court in determining whether the assistance of counsel was constitutionally defective. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S. Ct. 478, 94 L.Ed. 585 (1950); United States v. Gonzalez, 321 F.2d 638, 639 (2d Cir. 1963); United States v. Miller, 254 F.2d 523, 524 (2d Cir.), cert. denied, 358 U.S. 868, 79 S.Ct. 100, 3 L.Ed.2d 100 (1958). Leeson's attorney's advice as to maximum sentence was not so "'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interest' . . ."

United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909, 91 S.Ct. 1385, 28 L.Ed.2d 651 (1971), quoting United States ex rel. Masell v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967).

"[E]rroneous advice by defense counsel as to sentence does not support attack under § 2255 unless it amounts to 'ineffective assistance of counsel' . . . ." United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964). See United States ex rel. LaFay v. Fritz, 455 F.2d 297 (2d Cir.), cert. denied, 407 U.S. 923, 92 S.Ct. 2471, 32 L.Ed.2d 809 (1972); United States ex rel. Bullock v. Warden, 408 F.2d 1326 (2d Cir. 1969), cert. denied, 396 U.S. 1043, 90 S.Ct. 688, 24 L.Ed.2d 686 (1970).

The disappointment of an expectation fostered by an attorney's inadvertence in advising or failing to advise a defendant as to a legal consequence of a guilty plea does not make the plea involuntary. United States ex rel. Scott v. Mancusi, supra; United States v. Caruso, 280 F. Supp. 371 (S.D.N.Y.1967), aff'd sub nom. United States v. Mauro, 399 F.2d 158 (2d Cir. 1968) (per curiam), cert. denied, 394 U.S. 904, 89 S.Ct. 1010, 22 L.Ed.2d 215 (1969); United States v. Parrino, 212 F.2d 919 (2d Cir.), cert. denied, 348 U.S. 840, 75 S.Ct. 46, 99 L. Ed. 663 (1954). When a defendant enters a guilty plea he waives his right to trial and "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." McMann v. Richardson, 397 U.S. 759, 774, 90 S.Ct. 1441, 1450, 25 L.Ed.2d 763 (1970).

Section 2254 relief should be denied.

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OCT 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-96

DANIEL E. DAMON, Superintendent of Elmira Reformatory,

Petitioner,

against

SHELDON LEESON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF AND BRIEF IN OPPOSITION TO RESPONDENT'S CROSS PETITION FOR CERTIORARI

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Respondent's sole claim throughout these proceedings has been that his guilty plea was entered on a misunderstanding as to the maximum possible sentence he could receive because of the alleged failure of his trial attorney to inform him that he could alternatively be sentenced to a five year reformatory term because of his age. It is undisputed that neither the prosecutor nor the trial court made any representations which were not met. Under these circumstances, the Circuit Court should have assessed the validity of respondent's plea in terms of the overall adequacy of his counsel's representation and not pursuant to the more restrictive standard set forth in *Kercheval* v.

United States, 274 U.S. 220 (1927), reserved for those cases where the prosecutor or trial court has misled a defendant.

At bar, the State of New York had a very strong case against the respondent. The respondent had admitted his participation in the larceny of Hayden Stone, Inc., to the officers of the Company and additionally, his codefendant, Samuel Carville, had implicated him. Respondent has never alleged that he had any defenses to the charges against him, his attorney's advice to plead guilty was sound, and his allegations that his attorney failed to inform him of an alternative sentencing provision is insufficient to invalidate his plea.

Respondent argues that the Circuit Court properly relied on *Kercheval* v. *United States, supra* and held that respondent's plea was not knowingly and intelligently entered, relying on cases cited by the majority opinion (Pet. Appendix pp. 23-24). However, these cases fail to support the Circuit Court's holding since they (1) illustrate shocking and aggravated cases of inadequate or no legal representation, *Wade* v. *Wainwright,* 420 F. 2d 898 (5th Cir. 1969) (defendant, apparent novice to the criminal courts, subjected to ten instead of two years imprisonment); (2) are discretionary determinations by the federal courts to vacate pleas pursuant to Rule 11 of the Federal Rules of Criminal Procedure, *Matthews* v. *U.S.,* 308 F. Supp. 456 (S.D.N.Y. 1969); *McCullough* v. *U.S.,* 308 F. Supp. 741 (N.D. Fla. 1964), *Kotz* v. *U.S.,* 353 F. 2d 312 (8th Cir. 1965), *Wells* v. *U.S.,* 452 F. 2d 1001 (5th Cir. 1971); or (3) are cases where the court or prosecutor made a sentence representation, *Marvel* v. *U.S.,* 380 U.S. 262 (1965).

In short, in none of these cases did the Courts adopt the blanket rule adopted by the Second Circuit at bar which, in effect, invalidates a guilty plea simply because

defense counsel made an erroneous assessment, notwithstanding that the record as a whole supports the conclusion that counsel's overall representation was in all respects adequate. (see opinion of HAYS, J. dissenting).

Respondent, in support of his cross petition for certiorari, argues that the Circuit Court should have vacated his conviction instead of remanding him to the District Court for a fashioning of a remedy.

However, as petitioner has set forth in his petition, respondent was a state prisoner attacking a state conviction and the State Court is the proper forum for determining the relief to be accorded him. Unlike the defendants in *Bentley* v. *Florida*, 285 F. Supp. 494 (S D Fla. 1968); *People* v. *Kvalheim*, 17 N Y 2d 510 (1966); *People* v. *Scala*, 26 N Y 2d 753 (1970) and *People* v. *Witenski*, 15 N Y 2d 392 (1965), relied upon by respondent here, respondent does not deny the overall effectiveness of his attorney's representation, but merely attacks the sentence he received. Moreover, in none of these cited cases did the defendant plead to a reduced charge of the indictment as did respondent here. Although respondent at bar has served five years, if convicted on the original indictment for Forgery and Grand Larceny in the First Degree, he faces a twenty-year prison term and as the Circuit Court observed upon reargument (Respondent's Exhibit A), the five years would be available as a credit on this twenty-year term. In any event, insofar as respondent argues that the plea should be vacated, he relies principally upon New York law, supporting petitioner's argument that respondent should be remanded to the New York Courts for the fashioning of relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and respondent's cross petition for certiorari should be denied.

Dated: New York, New York, October 4, 1974.

Respectfully submitted,

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Mr. Del Grosso: If I may, I say if I believe my voice has been recorded I therefore respectfully ask to be taken before a District Court Judge to be asked whether my conversation has been electronically intercepted. How could you determine that, I mean know beforehand there have been interceptions.

The Court: He wants to know whether his voice has been intercepted and whether that is the foundation of the questioning.

His voice has been intercepted but that is not a question.

The Court: That is datum 1. Does the interrogation which he plans to proceed with use as the basis the transcription or recording of his own voice.

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Mr. Del Grosso: Some of the questions will.

The Court: I do not know where that gets us, but as long as we have that. Now is a second suggestion, and perhaps at this point it becomes immaterial, do you mean to use recordings of his voice that were made on a New York State Interception Order.

Mr. Del Grosso: I have none, I have absolutely none, your Honor. I never received any transcriptions, any tapes, and I have no conversations with any State authorities concerning it. I may add any conversations I have had with any federal authorities I have asked that question. When I said federal authorities, I mean federal investigative agencies I have asked such questions.

The Court: You are asking them have we any State stuff.

Mr. Del Grosso: Right, and I never received any affirmative reply, it has always been no.

The Court: That clears up that much of the underbrush anyway. He has said two things at this point. We do not plan to seek an indictment against Mr. Langella, that we do want his testimony.

Mr. Del Grosso: Yes, your Honor.

Mr. Newman: And I take it then that we also have on the record the fact that the questions to be asked

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of Mr. Langella are a part or in whole based upon electronic interception.

The Court: In part yes.

Mr. Newman: I would therefore ask and this I acknowledge I may be premature on until questions are posed— I would therefore ask so I am not considered to have waived that right, that if these interceptions are predicated upon any electronic interception based on a Court Order, that the Court Order be submitted to your Honor at least in camera for your Honor to examine them under the authority of Persico.

The Court: Well, what do you say.

Mr. Del Grosso: I would disagree to that, your Honor. I am very much against it. First of all, the statute and the legislative history—

The Court: What did the footnote in Gelbart say.

Mr. Del Grosso: The footnote in Gelbart—

Mr. Newman: Calendra, your Honor.

The Court: Yes.

Mr. Newman: The footnote in Calendra I think you are making reference to seems to indicate as far as Calendra is concerned, it was not intended to deal with those cases where the party retains a statutory or constitutional right. They are only

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dealing with search and seizure. By its language they seem to exclude 2515 of Title 18. Is that the reference your Honor has.

The Court: Yes, something like that. That is why I asked to have my recollection refreshed and then it referred to Gelbart.

Mr. Del Grosso: 2515 is subject to 2517 and 2518, where they start talking.

The Court: About something which I disagree with, which you know.

Mr. Del Grosso: I am looking at the legislative history. I look at the statute and at the Court cases.

The Court: That is the point I did have to decide in an earlier case.

Mr. Newman: Yes your Honor, you decided in Viggria, Assaro—in any event the strike force took an appeal to the Circuit Court in connection with that which we are arguing April 26th and I served and filed my brief. I might add in defense of your Honor's position which is a rare pleasure, just yesterday.

The Court: A hopeless defense.

Mr. Newman: I hope not, your Honor, I hope it is a hopeful defense.

In any event, I think within the language of the case that they constantly rely on, within the lan-

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guage of Persico, the procedure I am requesting is in effect suggesting because they seem to commend Judge Judd in the Persico situation for having at least examined the Order in camera. I cannot see

how anybody is prejudiced by a submission to your Honor in camera of that material.

The Court: As you know, my own approach in these things is simply to ask whether this recording or recordings of Mr. Langella's voice were recordings that were made under an Order of the Judge of this Court.

Mr. Del Grosso: Yes your Honor.

The Court: And was the order still in effect at the time of the interception.

Mr. Del Grosso: Yes your Honor.

The Court: And were the requisite reports made and filed after the intereception.

Mr. Del Grosso: Yes your Honor.

The Court: Was the inventory served.

Mr. Del Grosso: The inventory was served. I went over that with Mr. Newman today and I do not think that the inventory—

The Court: Was it served on Mr. Langella.

Mr. Del Grosso: Mr. Langella, I will bring him to the Court and describe how we attempted to serve

him at the particular address he gave to the grand jury today.

The Court: No, all you had to do was in good faith.

Mr. Del Grosso: They were sent and refused. As to the inventory itself, I do not believe if the inventories were not sent, that is not a question here because the inventory, the first inventory there was a discrepancy of 30 days. Now I understand what that discrepancy is. As I explained to Mr. Newman, all

you have to do is write things down and think a little harder, which I did. As the statute specifically states, it is 90 days after the determination of the order or extension thereof. What I did was actually send out two inventories when I only had to send out one. So all inventories and all reports have been made. That is on record with the Clerk, they are filed with the Clerk, your Honor.

The Court: My view of the matter is that if it has already been passed on by a Judge of this Court then something better than an in camera inspection has already occurred, that is if they have been solemnly passed upon by a Judge of this Court and the practice of this Court, and I suppose universally that means, that after the affidavits were read by the

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Judge in the presence of the affiants, and that I think almost all of the Judges interrupt their reading to ask the question and get explanatory statements, and then swear the affiants to the affidavits and so indicate on the original affidavits before the Order is signed. For me to repeat that work is simply carrying coals to Newcastle here, it has been done.

Mr. Newman: With one or two minor differences, if your Honor please. For example, I would inquire through your Honor whether if since I gather from Mr. Del Grosso there were extensions of the original Order based on his last statement concerning the notices, I would ask your Honor to examine it with this in mind. If there came a point during the first interception when Mr. Langella's voice was re-

corded, whether in fact the subsequent amending orders included Mr. Langella's voice included as someone being recorded. I recognize I have the Kahn case against me from the United States Supreme Court but I would submit to your Honor that this is just one area that obviously the sitting Judge who issued the order could not have taken into consideration or would not have been brought to his attention as specifically as that.

The Court: I recollect that on the renewal or re-

sumption Order it is not usual to mention every voice heard but only to name those people not originally named as against whom in some form an extension of the scope of the order is sought or where an addition of that person's name lends some support to the foundation for seeking the further Order.

Mr. Del Grosso: I may say in line with your Honor's remarks there is no requirement that the government has to put in whose voice was picked up as long as there is probable cause.

The Court: I would not think so, I would hope we would be spared that.

Mr. Del Grosso: If we take it one step further, what he wants to hear is what we have, what is on the tapes and wants to hear everything on the tapes and whether or not he agrees with what is on the tapes and then maybe he will testify.

The Court: I do not think we have to look into the heart of Mr. Langella or Mr. Newman's heart.

* * * * *

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4:40 o'clock p.m.

Mr. Del Grosso: At this time, your Honor, the government makes an application to cite the witness, Mr. Langella, for contempt for refusal to answer the question put to him by the grand jury. He refused to answer.

The Court: Have you got the grand jury reporter?

Mr. Del Grosso: I'll get the grand jury reporter here.

Mr. Newman: May I suggest something else, Judge?

The Court: What's that?

Mr. Newman: I'm going to ask, if your Honor please, to consider granting a hearing because the last question that was asked of Mr. Langella or the first question or the questions asked of Mr. Langella which is the source of the application, to punish him for contempt, and I believe I'm paraphrasing it correctly, was if he knew one Alfonse Persico. That question was asked of him before the Manhattan grand jury, also. Therefore, asking now, Judge, since they have in effect asked your Honor to institute a proceeding against this particular witness now, and they've changed this category, I'm asking your Honor

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to consider granting a hearing—

The Court: If it's not to institute a proceeding against him. He was asked a question. He declined to answer it and the question that we're on now is, is it a question that he must answer? It hasn't been decided yet.

Mr. Newman: All right, sir.

I'm sorry I misinterpreted the procedure.

The Court: I'm glad to hear your argument although I had disposed of it.

Mr. Del Grosso: This is Miss Ng, the grand jury reporter. We can swear the witness and she can just read it.

The Court: Read the questions so we'll know it.

Mr. Del Grosso: The whole thing or the last?

The Court: The point where the difficulty started.

Miss Ng: "Question: Mr. Langella, you have conferred with your attorney?

"Answer: Yes.

"Question: Then what's your answer?

"Answer: I respectfully decline to answer—"

The Court: What was the question he was asked.

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Miss Ng: "Question: Mr. Langella, I'll repeat the question. Do you know Alfonse Persico?

"Answer: I would like to speak to my lawyer about that.

"Question: Did you just speak to your attorney, sir? I mean where do we stand? I am asking the questions.

"Answer: And I would like to speak to him about that.

"Question: Did you converse with your attorney concerning what's going on in here?

"Answer: I would like to speak to my attorney about the first question.

"Question: Before you go out, I will say this; that you have the right to speak with your attorney, how-

ever, you were there now. This is contempt by the very fact that you come in. You go out. You understand that?

"Answer: I would like to speak to my attorney about the first question."

The witness went out and came back in.

"Question: Mr. Langella, you have conferred with your attorney?

"Answer: Yes.

"Question: Then what's your answer?

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"Answer: I respectfully decline to answer on the grounds that my answer may tend to incriminate me or degrade me and in violation of my right under the fourth and fifth amendment to the United States Constitution. I also was advised that this grand jury I am presently under indictment in New York County awaiting trial and I refuse to answer.

"Question: Mr. Langella, perhaps you have read the same statement twice. Maybe there was another paper that you were given. You were just given that paper by your attorney?

"Answer: Yes.

"Question: You do realize that you have made that same statement prior to this?

"Answer: I refuse to answer.

"Question: Now I will ask the grand jury forelady to instruct the witness to answer pursuant to the terms of Judge Bartels' Order granting him immunity in that he had to testify and if he doesn't that he could be cited for contempt.

"The Forelady: I'm ordering you to answer.

"Answer: I refuse to answer.

"Question: All right, we'll go up to the Judge."

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* * * * *

The Court: I will not repeat what I said before. The reason for advising the witness that he need not answer the question I find to be wholly inadequate and I must direct the witness to answer the question. Before the grand jury, of course. And I must warn him that if he does not answer the question, then I will have to hold you in contempt.

* * * * *

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Mr. Del Grosso: We are back, your Honor.

The Court: We need the stenographer. And do we need the foreman?

Mr. Del Grosso: I don't know, but I will get them.

(Pause.)

Mr. Del Grosso: Again, the government renews its application to have Mr. Langella held in contempt pursuant to the Civil Contempt Proceedings or the provisions of Title 18 Section 1826 for failure to testify before the grand jury.

The Court: Could you come forward, please, Madam Foreman?

What is the section?

Mr. Del Grosso: I have 1826, Title 28.

The Clerk: What is your name?

Madam Foreman: Blanche Borland.

The Court: Mr. Langella, I am going to ask the grand jury Court reporter to read the part of the

transcript on which the application of Mr. Del Grosso to hold you in contempt is based.

Could you read it, please?

Grand Jury Reporter: "Mr. Langella, I repeat

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the question, do you know Alfonse Persico?

"Answer: I refuse to answer.

"Question: I asked the forelady again to order the witness to answer the question pursuant to the Order of Judge Bartels.

"The Forelady: I order you to answer the question, please.

"Answer: I refuse to answer.

"Question: I will have to go upstairs to Judge Dooling."

The Court: Is that what occurred before the grand jury, Mr. Langella?

Mr. Langella: Yes.

The Court: I had advised you before you went down to the grand jury that this and other questions put by the United States Attorney you would have to answer.

And if you failed to answer them, I would have to commit you for a civil contempt of Court.

Do you, sir, persist in your refusal to answer the question?

Mr. Langella: Yes.

The Court: I have no alternative then, Mr. Langella, but to hold you and I do now hold you in contempt pursuant to the provisions of Title 28 United

—43—

States Code Section 1826. And you are ordered to

be confined to the United States Federal House of Detention on West Street in Lower Manhattan until such time as you are willing to give the testimony required of you by Mr. Del Grosso in connection with the present grand jury proceeding.

As I explained to you, that commitment will continue until you manifest a willingness to testify and return and do testify. Or until the grand jury as it may be extended expires.

Do you understand?

Mr. Langella: Yes, your Honor.

The Court: Very well. Marshal.

Mr. Newman: Your Honor, I would request in the alternative in view of the fact Mr. Langella has been available each and every time required, I might also add the last time he was subpoenaed Mr. Del Grosso was ill and we put it over for two weeks and Mr. Langella nevertheless appeared and had the proceeding continued voluntarily. He appeared before the grand jury for the continuance of the subpoena, and Mr. Del Grosso will attest to this. I would ask for a two week stay of commitment to permit me to go to the Circuit Court of Appeals.

Mr. Del Grosso: I would ask that be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1741

ALPHONSE PERSICO AND JERRY LANGELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 491 F. 2d 1156.

JURISDICTION

The judgment of the court of appeals with respect to petitioner Persico was entered on February 19, 1974. With respect to petitioner Langella, the court of appeals has as yet rendered no judgment. The petition for a writ of certiorari was filed on May 20, 1974. Petitioner Persico invokes the jurisdiction of this Court under 28 U.S.C. 1254(1). Petitioner Langella, in petitioning for a writ of certiorari prior to judgment in the court of appeals, invokes the jurisdiction

of this Court pursuant to 28 U.S.C. 1254(1) and 2101 (e).

QUESTIONS PRESENTED

1. Whether a grand jury witness whose telephone conversations have been intercepted pursuant to court orders is entitled to litigate the validity of such interceptions in civil contempt proceedings brought after the witness has refused to answer questions based upon information acquired from the interceptions.

2. Whether the provisions of Rule 42(b), Fed. R. Crim. P., are applicable to civil contempt proceedings under 28 U.S.C. 1826.

3. Whether, in the circumstances of this case, the contumacious witness was misled as to the scope of immunity conferred upon him by 18 U.S.C. 6002.

STATEMENT

1. On January 23, 1974, in the United States District Court for the Eastern District of New York, petitioner Persico was found to be in civil contempt, pursuant to 28 U.S.C. 1826(a), for refusing to answer a question before a grand jury. He was committed to custody for 60 days, or until such earlier time as he purged himself of the contempt.[1] The court of appeals affirmed (Pet. App. 1a–14a).

On April 17, 1974, petitioner Langella was likewise found to be in civil contempt pursuant to 28 U.S.C. 1826(a) for refusing to answer a question before a grand jury. He was committed to custody for the du-

[1] Petitioner Persico has served the 60 days without purging the contempt and is no longer incarcerated.

ration of the life of the grand jury or until such earlier time as he purged himself of the contempt. The case, however, has not yet been heard or decided by the court of appeals,[2] and the petition is premature.

Rule 20 of the Rules of this Court provides that "[a] writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court." That test is not met here, and Langella's only justification for seeking to bypass the court of appeals is the insufficient contention that his arguments are foreclosed by that court's decision in the case involving petitioner Persico.[3] Believing that Langella's petition should be denied as premature, we do not address the specific circumstances of his contempt conviction.

2. On January 23, 1974, petitioner Persico was summoned before a special grand jury in the Eastern District of New York investigating "racketeering influence in legitimate business." Petitioner, invoking his Fifth Amendment privilege, refused to answer questions. He was thereafter granted "use" immunity

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[2] On April 26, 1974, petitioner Langella filed a notice of appeal and on May 13, the record was transmitted to the court of appeals; however, Langella has not filed a brief in that court.

[3] The panel that affirmed Persico's conviction included only one active circuit judge, and Langella's chances of obtaining a different ruling from a different panel are not insignificant, particularly in light of a subsequent somewhat contrary ruling by another court of appeals (see p. 14, *infra*, n. 11).

pursuant to 18 U.S.C. 6002 and 6003. When subsequently brought before the grand jury and ordered to answer, he refused to answer questions concerning his employment, claiming that the questioning derived from unlawful electronic interception of his conversations (Pet. App. 3a; H. 12–15).[4] Petitioner was thereupon brought before the district court where he objected that the intended questioning of him would be based upon information derived from electronic surveillance conducted at his home in 1973. The government conceded that questions concerning petitioner's employment had been based in part upon the results of electronic surveillance. The district court regarded petitioner's objection as premature, however, since the only question that had been asked at that point was whether he was employed. Petitioner then reappeared before the grand jury where he answered certain questions regarding lawful employment but again refused to answer about any other employment (G.J. 5–8).[5]

Petitioner was again brought before the district court and renewed his objection to the questioning as being derived from unlawful electronic surveillance. The government, having conceded that the questioning was derived from electronic surveillance, maintained that, because the surveillance was lawfully conducted pursuant to three court orders, petitioner

[4] "H." refers to the transcript of proceedings in the district court on January 23, 1974, a copy of which we are lodging with the Clerk.

[5] "G.J." refers to the transcript of grand jury proceedings on January 23, 1974, a copy of which we are lodging with the Clerk, under seal.

had no ground for objection.[6] The district court examined the orders and supporting papers *in camera* and found them to be valid (H. 36–39).[7] The court denied petitioner's request to test the legality of the surveillance by a motion to suppress and again ordered him to testify (Pet. App. 3a).

Petitioner returned to the grand jury and there answered questions concerning his involvement in other enterprises, including an illegal gambling business. He once again became recalcitrant, however, when asked to identify the individuals who worked for him in that unlawful enterprise (Pet. App. 3a–4a). He based the refusal to answer on the alleged illegality of the electronic surveillance. Petitioner was

[6] The first order, dated March 21, 1973, permitted interception over petitioner's residence telephone for fifteen days. An order of April 9, 1973, extended the surveillance for a further period of fifteen days. On May 8, 1973, another order, also directed at petitioner's residence telephone, was issued. In August 1973, petitioner was notified of these interceptions. Thereafter, petitioner promptly commenced an action pursuant to 18 U.S.C. 2518(8)(d) for disclosure of the wire interception applications and orders. Petitioner also sought to have the applications inspected *in camera* to determine whether the probable cause requirements of Section 2518(3)(a), (b) and (d) had been met. The government opposed disclosure on the ground that it would effectively halt an ongoing investigation. On August 20, 1973, the district court denied the motion as premature, concluding that the interests of justice would be "better served by delaying disclosure until after indictment, or after abandonment of the investigation." *In re Persico*, No. 73 C 1213, decided August 20, 1973 (E.D. N.Y.). We are lodging a copy of the district court's Memorandum and Order with the Clerk.

[7] Petitioner's counsel sought disclosure of the orders and affidavits so that a motion to suppress could knowledgeably be made. The government opposed disclosure, particularly because information reflected in the affidavits related to an ongoing investigation (H. 30–31, 36–39, 41).

thereupon held in contempt and committed to custody for 60 days or until such earlier time as he agreed to answer the question. Petitioner then renewed his motion to suppress and to inspect the wiretap orders and supporting affidavits. The motion was denied (Pet. App. 4a–5a).

ARGUMENT

1. At the outset, we advert to the possible mootness of the case. Petitioner has been unconditionally released from the 60-day commitment imposed by the contempt order. Moreover, it has not been suggested that the adjudication of civil contempt entails any further "disabilities or burdens" under either federal or state law. Compare *Ginsberg* v. *New York*, 390 U.S. 629, 633–634, n. 2; *Carafas* v. *La Vallee*, 391 U.S. 234, 237–238. Nor can such "collateral consequences" reasonably be presumed here. Compare *Sibron* v. *New York*, 392 U.S. 40, 53–58. Accordingly, this case may be governed by *St. Pierre* v. *United States*, 319 U.S. 41.

To be sure, here, unlike *St. Pierre*, petitioner did make timely application to this Court for bail, expressly representing that the case would become moot if his sentence expired (see Pet. 7). It is questionable, however, whether those applications were effective to defeat mootness. We note initially that petitioner had not, before applying to this Court, sought bail from the court of appeals after its affirmance of the contempt order. He argued that, in the circumstances, that would have been a futile gesture because that court had denied him bail pending appeal, having in-

stead accelerated the hearing (see Pet. 7). But this Court may not have accepted that excuse and may have grounded its denial of bail on petitioner's failure to exhaust his remedies below. If so, petitioner may not have effectively brought himself within the exception to the *St. Pierre* rule by doing everything in his power to preserve his case for review here. Compare *Sibron* v. *New York, supra,* 392 U.S. at 51–53.

A more fundamental question is whether an application for bail or for a stay preserves a case against mootness when it is denied. We assume this Court has power to moot a case by denying the relief that would preserve it, and that when that happens the matter is at an end. We do not read *Sibron* as overruling that doctrine. Indeed, the Court has seemingly indicated the contrary in *Noyd* v. *Bond,* 395 U.S. 683, 688–693. There, in an elaborate discussion, the rejection of the government's suggestion of mootness is apparently grounded solely on the effectiveness of a stay of a military sentence granted by Mr. Justice Douglas for the apparent purpose of defeating mootness.

Finally, we deem it incumbent on us to advise the Court that it is the government's present intention to recall petitioner before the grand jury if certiorari is denied. Thus, the issue may well recur. How this affects the question of mootness is not clear. One might well argue that it places the case into the category of continuing disputes which the Court has held are not moot even when the order sought to be reviewed has expired. *E.g., Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 178–179. On the other hand, in circumstances identical to

ours, *St. Pierre* expressly ruled otherwise. There, the Court deemed the government's intention to recall the witness before the grand jury a factor supporting the ruling of mootness. 319 U.S. at 43.

2. Petitioner's primary contention is that 18 U.S.C. 2515 provides a grand jury witness with a defense in contempt proceedings under 28 U.S.C. 1826(a), where it is alleged that the question before the grand jury derived from information acquired from unlawful electronic surveillance, even though the allegedly unlawful interceptions were conducted pursuant to court orders. In a thorough opinion, upon which we rely in the main, the court of appeals rejected this contention (Pet. App. 1a–14a).

In *Gelbard* v. *United States*, 408 U.S. 41, this Court held that Section 2515 provides such a defense where the interception was not conducted pursuant to court order. The Court left undecided, however, the question presented in this case: whether witnesses "may refuse to answer questions if the interceptions of their conversations were pursuant to court order." 408 U.S. at 61, n. 22. Moreover, Mr. Justice White, concurring, explicitly suggested the result reached here (*id.* at 70):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the

> same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best.[8]

We submit that these considerations, endorsed by the Court in *United States* v. *Calandra*, 414 U.S. 338, should govern here.

For a fuller elaboration of the controlling principles, we invoke the following passage from the opinion of the court below (Pet. App. 9a–12a):

> Congressional concern over disruption of smooth and efficient operation of the grand jury system is found in the legislative history of Chapter 119, also. Senate Report No. 1097, printed in 1968 U.S. Code Cong. & Admin. News p. 2112, appears to controvert Persico's contention that in defending the contempt proceedings resulting from his refusal to answer a question before the grand jury he is entitled to a suppression hearing. Though the legislative history recognizes that illegally obtained

[8] In light of the express reservation of the issue in both the majority opinion and the concurring opinion of Mr. Justice White, petitioner's contention that *Gelbard* resolves the question in untenable. It is true that as to two of the four witnesses covered by the *Gelbard* opinion (Gelbard and Parnas) the government had disclosed the existence of court orders for the wiretaps. But, presumably because the other case (Egan and Walsh) involved electronic eavesdropping not authorized by any court order, the decision addresses that situation. Recognition of the court orders supporting the intercepting as to Gelbard and Parnas is, however, implicit in the marginal note leaving resolution of the issue in these circumstances to the district court on remand. 408 U.S. at 61, n.22.

wiretap evidence, or the fruits thereof, must be excluded from any proceedings before a grand jury, the history further discloses that the exclusionary rule "must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress." Senate Report No. 1097, *supra*, U.S. Code Cong. & Admin. News 1968, at p. 2185. Most crucial to our task, therefore, is the congressional understanding of the effect of § 2518(10)(a) on the grand jury process:

> "Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. *Because no person is a party as such to a grand jury proceeding, the provision does envision the making of a motion to suppress in the context of such a proceeding itself.* Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual (*Blue* v. *United States* [*United States* v. *Blue*], 86 S. Ct. 1416, 384 U.S. 251 [16 L. Ed. 2d 510] (1965).) There is no intent to change this general rule. It is the intent

> of the provision only that when a motion to suppress is granted *in another context*, its scope may include use in a *future* grand jury proceeding . . ." Senate Report No. 1097, *supra*, U.S. Code Cong. & Admin. News 1968, at p. 2195. (Emphasis supplied).

As noted, though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings. These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding. In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served. But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one important aim of the legislation would be frustrated.

Appellant, however, referring also to the language of the legislative history quoted above, would have us find that the contempt proceeding here is a proceeding in "another context" and therefore the general proscription against hearings upon motions to suppress in grand jury proceedings does not prevent motions to

suppress and hearings thereon in contempt proceedings arising out of a witness's refusal to answer a grand jury's question. While appellant's argument is a superficially plausible one, his reasoning in support of the argument is unrealistic. The contempt mechanism employed here to coerce testimony is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of those proceedings. Obviously, any expansion of the breadth of inquiry permissible in a contemporaneous contempt proceedings initiated because of the recalcitrance of a grand jury witness necessarily inhibits the smooth functioning and efficient operation of that grand jury.

Moreover, Congress could not have intended that a *contemporaneous* civil contempt proceeding such as the one involved here—a proceeding whose only purpose is to invite a recalcitrant witness to cooperate with the grand jury—is a proceeding "in another context" rather than in the context of the grand jury's proceedings. That the congressional intent was so limited is demonstrated by the language of the Senate Report that the scope of a suppression order granted "in another context" may extend to a "future grand jury proceeding," that is, may extend only to a grand jury proceeding which clearly postdates the proceeding "in another context." Therefore the term "another context" could not have been intended to include a hearing on a contempt citation contemporaneous with the grand jury proceeding.

We hold that in contempt proceedings initiated when a witness who has been granted

"derivative use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful. Here there were three court orders. Inasmuch as Judge Judd conducted an in camera inspection to ascertain whether they complied with the statute and found that they did comply, Persico received all that he was entitled to receive. He therefore has no basis for complaint that his motions for suppression hearings were denied.[9]

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[9] We depart from the opinion of the court of appeals to the extent that it may imply that petitioner was entitled to receive what he did in fact receive, *i.e.*, the district court's *in camera* examination of the wiretap orders and applications to determine whether the statute had been complied with in all respects. In our view, all that is required, once a witness claims that questioning derives from unlawful electronic surveillance, is that the government, if there has been an overhearing, acknowledge that fact and produce a court order (*in camera* if open disclosure would compromise the investigation), and concede illegality when it is patent. Under 18 U.S.C. 3504(a)(1), upon the claim of a party, the government is required to "affirm or deny the occurrence of the alleged unlawful act * * *." See *Gelbard* v. *United States*, *supra*, 408 U.S. at 52–55, where this Court rejected the government's contention that Section 3504(a)(1) applied only to those illegal interceptions that occurred prior to June 19, 1968, the

Notwithstanding our submission that the decision below is basically correct, we recognize that the issue is potentially one for resolution by this Court. There is, moreover, a limited conflict between the ruling here and the First Circuit's decision in *In re Lochiatto*, 497 F. 2d 803.[10] Nevertheless, because only two courts of appeals have so far considered the question in this area of developing law, we suggest that it would be appropriate for this Court to defer review of the issue until the courts of appeals have been able more fully

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effective date of the federal wiretap statute. When it is established that a district judge has authorized the interception, it would seem unnecessary to submit the same materials to a second judge to confirm the initial determination of probable cause. Where a court order is produced, it is subject to a strong presumption of validity, given the stringent procedures of 18 U.S.C. 2510, *et seq.*, and, particularly, the prior authorization by a district court which, in the vast majority of cases, will assure full compliance with the statute.

[10] The First Circuit there concluded that, although 18 U.S.C. 2518(10)(a) does not give a grand jury witness standing to move for suppression, Section 2515 permits the witness to assert, as a defense in contempt proceedings, the grounds for suppression enumerated in Section 2518(10)(a) (i), (ii) and (iii). See *In re Marcus*, 491 F. 2d 901 (C.A. 1). The court further held, however, that a plenary evidentiary hearing with full disclosure was not necessarily required. Specifically, the court ruled that, at least where the government does not object to disclosure as constituting a breach of secrecy, the witness-defendant should be afforded an opportunity to examine the application, order, affidavits in support thereof, and a government affidavit submitted to indicate the time period of the surveillance. But, where the government interposes an objection on secrecy grounds and sensitive information cannot effectively be deleted from the materials, the district court must review the materials *in camera* to determine the constitutional and statutory validity of the interception. In that case, the government chose to comply with the ruling and did not seek review in this Court.

to treat it. The same considerations that led the Court to postpone decision of the question in *Gelbard* (despite the government's disclosure that two of the interceptions there were authorized by court orders) may still be controlling.

3. Petitioner also contends that the procedures embodied in Rule 42(b), Fed.R.Crim.P., dealing exclusively with criminal contempt, should have been followed here. The claim is not well taken. Cf. *Stewart* v. *United States,* 440 F. 2d 954, 957 (C.A. 9), affirmed *sub nom. Kastigar* v. *United States,* 406 U.S. 441. Where a witness, "without just cause," refuses "to comply with an order of the court to testify," 28 U.S.C. 1826(a) expressly provides for summary confinement. A contempt proceeding under 28 U.S.C. 1826 is civil in nature, because its purpose is remedial and coercive. *Shillitani* v. *United States,* 384 U.S. 364. In *Shillitani,* this Court observed that contempt proceedings must be viewed as remedial and therefore civil in nature, where, as here, "the court conditions release upon the contemnor's willingness to testify." *Id.* at 370. Accordingly, the procedural requirements of Rule 42(b) for criminal contempt have no application here.[11]

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[11] This case does not present the question before the Court in *United States* v. *Wilson,* No. 73-1162, certiorari granted May 13, 1974. In *Wilson,* the government is urging that summary criminal contempt proceedings under Rule 42(a) should be available when a witness, in disobedience of a court order, refuses to testify at trial after receiving a grant of immunity. The government is also urging that insofar as *Harris* v. *United States,* 382 U.S. 162, dictates the applicability of Rule 42(b) under such circumstances, that decision should be over-

4. Petitioner's final contention is that he was improperly held in contempt for refusing to testify because the government's explanation to him of the scope of immunity conferred by 18 U.S.C. 6002 was inadequate. The court of appeals, although observing that the prosecutor's "explanation of the 'use' and 'derivative use' immunity conferred on Persico under 18 U.S.C. § 6002 was not the epitome of either precision or lucidity," rejected this claim (Pet. App. 13a–14a). Petitioner was told that nothing he said could be used against him in *any* proceeding and that only if the government developed evidence independent of his testimony could he be prosecuted concerning any matters about which he testified (G.J. 3, 5). The court of appeals properly concluded that petitioner was "probably sufficiently apprised * * * of the extent of the immunity he had been granted" and that, in any event, it was extremely unlikely that he

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ruled. The critical distinction here, however, is that, unlike *Harris* and *Wilson*, the district court chose to treat the contempt civilly.

Petitioner points to the decision in *United States* v. *Alter*, 482 F. 2d 1016 (C.A. 9), in maintaining that there is a conflict between the Ninth and Second Circuits on this question. In *Alter*, a Ninth Circuit panel concluded that the provisions of Rule 42(b) are applicable to a contempt proceeding under 28 U.S.C. 1826. But see *Stewart* v. *United States*, *supra*. This holding is plainly at odds with the express language of Section 1826, which provides that such a contemptuous witness may be "summarily" confined. Of course, any contempts treated under this statute are civil—that is, remedial and coercive in nature—since the statute provides that confinement terminates once the witness is willing to give testimony. We again suggest that consideration of the issue by this Court would be more appropriate once the question has been more fully dealt with by the courts of appeals.

had been misled, "inasmuch as his experienced and competent counsel must have been fully aware of the extent of § 6002 immunity" (Pet. App. 13a–14a), and it is reasonable to assume that this understanding was communicated to petitioner.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
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Attorney.

SEPTEMBER 1974.

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[12] Notwithstanding any shortcomings in the prosecutor's explanation of the immunity provision to petitioner, it was "clearly made applicable to him * * *" (*Stevens* v. *Marks*, 383 U.S. 234, 244), and it was fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Id.* at 246. Petitioner's reliance upon *Stevens* is thus misplaced.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The government's brief (pp. 2, 5, n. 6) mistakenly leaves the impression that petitioner Persico's oral communications were intercepted by wiretapping. This memorandum is filed to indicate that, as called to our attention by petitioner's counsel and confirmed by the court orders and supporting papers, the interception challenged here did not involve a telephone wiretap. This correction in no way affects the merits of the questions presented by the petition or the government's position with respect thereto.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

FILED
OCT 21 1974

IN THE

Supreme Court of the United States

October Term, 1974

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

IN THE

October Term, 1974

Nos. .....

ALFONSE PERSICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

JERRY LANGELLA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

I.

Petitioner Persico's case is not moot.

Respondent, relying principally on *St. Pierre* v. *United States*, 319 U.S. 41 (1943), suggests that since petitioner Persico has been released after service of his sixty-day sentence for civil contempt, his case is moot. Respondent's reliance is misplaced and the contention is unsound.

The principle is well recognized that where it is not possible to bring a case to this Court before incarceration terminates, the case is not moot. See *Sibron* v. *United States*, 392 U.S. 40, 150-3 (1968). In the case at bar petitioner was ordered incarcerated for sixty days or until he purged the contempt, commencing on January 23, 1974. Notice of appeal was filed the following day and the Second Circuit denied bail on January 29. Counsel consented to an expedited briefing schedule in the Second Circuit Court of Appeals and that court rendered its decision on February 19, 1974, almost one month after petitioner's commitment began. Applications for a stay and bail pending certiorari were denied on March 7, 1974 by Mr. Justice Marshall, and on March 18, 1974 by the full Supreme Court. Petitioner was released several days later. Thus, with denials of bail pending appellate litigation, the length of petitioner's sentence made it physically impossible to bring the case to this Court before his incarceration terminated. (Compare *Sibron* v. *New York*, *supra*, where a six month term was deemed an insufficient opportunity to bring the case to this Court.)

In addition, petitioner sought bail and a stay of the order of incarceration at every level. Respondent's suggestion that these efforts were insufficient because a renewed application for bail was not made in the Circuit Court, after its affirmance of the district court order, rings hollow. Since bail had been denied by that court before its decision on the merits, a second application after the Circuit had already rejected the appeal would obviously have been futile, producing only further delay in bringing the matter to this Court.

Respondent also suggests that this Court's denial of a stay was tantamount to a decision that the case was one which should be allowed to become moot. No such intent can or should be inferred from a denial of an application for a stay. Indeed, the denial of a stay can just as well be

interpreted as a recognition that the case would not be moot under *Sibron*, and therefore a stay was unnecessary to preserve the issue for review. Moreover, since stay applications are generally not as thoroughly briefed as a petition for certiorari, it is not their function to decide the merits of an issue, even the merits of a mootness claim. See, e.g., *Locks* v. *Commanding General, Sixth Army*, 89 S. Ct. 31 (1968) (Op. of Mr. Justice Douglas).

Thus, unlike the petitioner in *St. Pierre, supra*, Persico exhausted every reasonable measure to obtain a stay, without which the length of his sentence made it impossible to bring his case to this Court before his incarceration expired. Under these circumstances, even *St. Pierre* recognizes that the concept of mootness does not apply.

In addition, and of equal significance in showing that this case is not moot, the government frankly concedes that "it is the government's present intention to recall petitioner before the grand jury if certiorari is denied" (Respondent's Brief, p. 7).

The Special September 1972 grand jury before which petitioner was subpoenaed was extended by Chief Judge Jacob Mishler on August 26, 1974, until March 19, 1975. Furthermore, 18 U.S.C. § 3331 permits application for an additional six-month extension, which could prolong the life of the grand jury to September 1975. If this case is held moot, petitioner would be resubpoenaed before the same grand jury and asked the same questions. He would then be recommitted and very likely released before being able to present his case to this Court, either because his term of incarceration, or the life of the grand jury, would have expired.

The nature of petitioner's commitment—civil contempt—leaves him open to the abuse of repeated incarceration for short periods with no redress to this Court; or so the

government contends. But this contention is ill founded. The government's admission that it intends to resubpoena petitioner places this case in the category of continuing controversies where the concept of mootness does not apply. See, *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911); *Moore* v. *Ogilvey*, 394 U.S. 814 (1969). Nor would further proceedings in the district court flesh out the record in any respect. In short, further proceedings in the lower courts would be a waste of judicial time and energy, to say nothing about petitioner's loss of liberty. The correctness of this reasoning was espoused in *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972). There the term of the new jury had expired and appellants had been released from their *civil* incarceration during the pendency of their appeal. The court held that the case was not moot because of the importance of the issue presented and because the history of the case "strongly suggests that the government will renew its efforts before another grand jury to obtain the information it sought to compel in the case before us." 466 F.2d at 1089. Far more than a suggestion in this case, the government concedes its intention to resubpoena petitioner.

In sum, whatever vitality the reasoning in *St. Pierre* retains, this case falls within its clearly delineated exceptions, as set forth in *Sibron*, and satisfies every test for the existence of a true "case or controversy."

II.

Petitioner Langella's case is not premature.

Unlike Persico, Langella is still in custody for civil contempt. He petitions for certiorari directly from the order of the district court pursuant to 28 U.S.C. §§ 1254(1) and 2102(e), having filed a protective notice of appeal to the Second Circuit. The government has not seen fit to

address his petition on the merits, claiming instead that his "only justification for seeking to bypass the court of appeals is the insufficient contention that his arguments are foreclosed by that court's decision in the case involving petitioner Persico" (Brief in Opposition, p. 3).

The respondent's argument has two prongs: first, that only one active circuit judge participated in the *Persico* decision and second, that in light of *In re Lochiatto*, 497 F.2d 803 (1st Cir. 1974), a decision in conflict with *Persico*, the Second Circuit might abandon the holding in *Persico*. No doubt through inadvertence respondent did not bring to this Court's attention the Second Circuit's holding in *In re Vigorito*, 499 F.2d 1351 (2d Cir. 1974), decided *after In re Lochiatto*, where it reaffirmed *Persico*. Participating in the panel which decided *Vigorito* were Judges Hays and Lumbard, both active Circuit Judges. Thus, respondent's contention was laid to rest long before it was made in this Court. The suggestion that a decision is required from the Second Circuit before seeking certiorari for this incarcerated petitioner is utterly futile in light of the factual near-identity of the cases. Such a procedure could only increase the risk that Langella, who has been denied bail, will be released before this Court renders its decision; a situation which results in mootness in respondent's view. Respondent seeks to create the horns of a dilemma upon which to skewer Langella. No such result should be permitted. See *Nixon* v. *United States*, — U.S. —, 41 L. Ed. 2d 1039 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973).

III.

The petition for certiorari should be granted.

Before addressing the merits, it should be noted that respondent's statement of the issue is factually incorrect: "Whether a grand jury witness whose telephone conversations have been intercepted. . . ." The electronic surveillance of petitioner Persico's home was not limited to intercepting telephone conversations. Rather, his home was "bugged." The telephones were rendered inoperative from some location outside petitioner's home, resulting in a service call to the home. Petitioner was informed by the "repair man" that new phones were required. Two phones were installed, one in the kitchen and one in the basement den, which acted as transmitters of all conversations in the adjacent rooms whether or not the phones were actually in use.

Respondent acknowledges that the issue posed in this petition is "potentially one for resolution by this Court" and that a "limited conflict" exists between the ruling below and *In re Lochiatto, supra* (Brief in Opposition, p. 14). Respondent's sole justification for opposing the granting of certiorari is, in effect, that not enough confusion exists concerning the proper resolution of this issue. Respondent suggests that the other circuit courts of appeals be given more time to express their opinions. This reasoning should be rejected.

In the first place, the two circuits which have directly addressed the issue are already in direct conflict. Future decisions by other circuits cannot resolve it; they will, in all probability, only exacerbate the split. Moreover, the questions presented in this case have been in the wind since this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41 (1972), and the federal courts of appeals are not alone

concerned with these issues. Since 18 U.S.C. § 2515 applies, by its terms, to state grand juries, the state courts are likewise seeking resolution of these questions of federal statutory interpretation. See, e.g., *People* v. *Einhorn*, 45 A.D. 2d 75, 356 N.Y.S. 2d 620 (1974). Thus, quite literally, every court in the nation is concerned with a definitive resolution of these issues.

More and more the grand jury and electronic interception are the favored implements of law enforcement. The two in combination pose truly frightening threats to personal liberty. Grand jury investigations are frequently substitutes for untenable criminal prosecutions. Witnesses are held in civil contempt, without indictment, without rights of confrontation, without jury trial and usually without bail, sometimes for years.* Under decisions such as *Persico*, all this is accomplished without the slightest benefit of the adversary system to establish a statutory defense. In short, the importance and significance of this issue to the administration of justice throughout the nation cannot be underestimated.

Finally, this case presents the issue in the crispest possible terms. The government has admitted the existence of electronic surveillance, and that its questioning is predicated on it. The witness has asserted his statutory rights to test the legality of that surveillance in defense to a civil contempt proceeding. What those rights are is an issue which should be decided by this Court and should be decided now.

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* 18 U.S.C. §§ 3331, et seq., provides for special grand juries with terms of up to three years. Compare Rule 6(g) Fed. R. Crim. P. also see, *Korman* v. *United States*, 486 F.2d 926, 933 (7th Cir. 1973).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

NOV 14 1974

MICHAEL RODAK, JR., CLERK

No. 73-1741

ALFONSE PERSICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

JERRY LANGELLA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for a writ of certiorari, entered on October 21, 1974, and (2) granting the petition. As grounds for this motion, petitioner states the following:

On October 21, 1974, just before the order denying certiorari was entered in the instant case, Petitioner's Reply Brief was filed with this Court. Inasmuch as certiorari was denied without time for this Court to consider that brief, petitioner respectfully asks the Court to reconsider its denial of certiorari in light of the arguments raised therein. Accordingly, petitioner's reply brief is reproduced in its entirety, and appended hereto.

REPLY BRIEF FOR PETITIONERS

I.

Petitioner Persico's case is not moot.

Respondent, relying principally on *St. Pierre* v. *United States,* 319 U.S. 41 (1943), suggests that since petitioner Persico has been released after service of his sixty-day sentence for civil contempt, his case is moot. Respondent's reliance is misplaced and the contention is unsound.

The principle is well recognized that where it is not possible to bring a case to this Court before incarceration terminates, the case is not moot. See *Sibron* v. *New York,* 392 U.S. 40, 50-3 (1968). In the case at bar petitioner was ordered incarcerated for sixty days or until he purged the contempt, commencing on January 23, 1974. Notice of appeal was filed the following day and the Second Circuit denied bail on January 29. Counsel consented to an expedited briefing schedule in the Second Circuit Court of Appeals and that court rendered its decision on February 19, 1974, almost one month after petitioner's commitment began. Applications for a stay and bail pending certiorari were denied on March 7, 1974 by Mr. Justice Marshall, and on March 18, 1974 by the full Supreme Court. Petitioner was released several days later. Thus,

with denials of bail pending appellate litigation, the length of petitioner's sentence made it physically impossible to bring the case to this Court before his incarceration terminated. (Compare *Sibron* v. *New York, supra*, where a six month term was deemed an insufficient opportunity to bring the case to this Court.)

In addition, petitioner sought bail and a stay of the order of incarceration at every level. Respondent's suggestion that these efforts were insufficient because a renewed application for bail was not made in the Circuit Court, after its affirmance of the district court order, rings hollow. Since bail had been denied by that court before its decision on the merits, a second application after the Circuit had already rejected the appeal would obviously have been futile, producing only further delay in bringing the matter to this Court.

Respondent also suggests that this Court's denial of a stay was tantamount to a decision that the case was one which should be allowed to become moot. No such intent can or should be inferred from a denial of an application for a stay. Indeed, the denial of a stay can just as well be interpreted as a recognition that the case would not be moot under *Sibron*, and therefore a stay was unnecessary to preserve the issue for review. Moreover, since stay applications are generally not as thoroughly briefed as a petition for certiorari, it is not their function to decide the merits of an issue, even the merits of a mootness claim. See, e.g., *Locks* v. *Commanding General, Sixth Army*, 89 S. Ct. 31 (1968) (Op. of Mr. Justice Douglas).

Thus, unlike the petitioner in *St. Pierre, supra*, Persico exhausted every reasonable measure to obtain a stay, without which the length of his sentence made it impossible to bring his case to this Court before his incarceration expired. Under these circumstances, even *St. Pierre* recognizes that the concept of mootness does not apply.

In addition, and of equal significance in showing that this case is not moot, the government frankly concedes that "it is the government's present intention to recall petitioner before the grand jury if certiorari is denied" (Respondent's Brief, p. 7).

The Special September 1972 grand jury before which petitioner was subpoenaed was extended by Chief Judge Jacob Mishler on August 26, 1974, until March 19, 1975. Furthermore, 18 U.S.C. § 3331 permits application for an additional six-month extension, which could prolong the life of the grand jury to September 1975. If this case is held moot, petitioner would be resubpoenaed before the same grand jury and asked the same questions. He would then be recommitted and very likely released before being able to present his case to this Court, either because his term of incarceration, or the life of the grand jury, would have expired.

The nature of petitioner's commitment—civil contempt—leaves him open to the abuse of repeated incarceration for short periods with no redress to this Court; or so the goverment contends. But this contention is ill founded. The government's admission that it intends to resubpoena petitioner places this case in the category of continuing controversies where the concept of mootness does not apply. See, *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911); *Moore* v. *Ogilvey*, 394 U.S. 814 (1969). Nor would further proceedings in the district court flesh out the record in any respect. In short, further proceedings in the lower courts would be a waste of judicial time and energy, to say nothing about petitioner's loss of liberty. The correctness of this reasoning was espoused in *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972). There the term of the new jury had expired and appellants had been released from their *civil* incarceration during the pendency of their appeal. The court held that the case was not moot because of the importance of the issue presented and because the history

of the case "strongly suggests that the government will renew its efforts before another grand jury to obtain the information it sought to compel in the case before us." 466 F.2d at 1089. Far more than a suggestion in this case, the government concedes its intention to resubpoena petitioner.

In sum, whatever vitality the reasoning, in *St. Pierre* retains, this case falls within its clearly delineated exceptions, as set forth in *Sibron*, and satisfies every test for the existence of a true "case or controversy."

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Petitioner Langella's case is not premature.

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The respondent's argument has two prongs: first, that only one active circuit judge participated in the *Persico* decision and second, that in light of *In re Lochiatto*, 497 F.2d 803 (1st Cir., 1974), a decision in conflict with *Persico*, the Second Circuit might abandon the holding in *Persico*. No doubt through inadvertence respondent did not bring to this Court's attention the Second Circuit's holding in *In re Vigorito*, 499 F.2d 1351 (2d Cir. 1974), decided *after In re Lochiatto*, where it reaffirmed *Persico*. Participating in the panel which decided *Vigorito* were Judges

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III.

The petition for certiorari should be granted.

Before addressing the merits, it should be noted that respondent's statement of the issue is factually incorrect: "Whether a grand jury witness whose telephone conversations have been intercepted. . . ." The electronic surveillance of petitioner Persico's home was not limited to intercepting telephone conversations. Rather, his home was "bugged." The telephones were rendered inoperative from some location outside petitioner's home, resulting in a service call to the home. Petitioner was informed by the "repair man" that new phones were required. Two phones were installed, one in the kitchen and one in the basement den, which acted as transmitters of all conversations in the adjacent rooms whether or not the phones were actually in use.

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In the first place, the two circuits which have directly addressed the issue are already in direct conflict. Future decisions by other circuits cannot resolve it; they will, in all probability, only exacerbate the split. Moreover, the questions presented in this case have been in the wind since this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41 (1972), and the federal courts appeals are not alone concerned with these issues. Since 18 U.S.C. § 2515 applies, by its terms, to state grand juries, the state courts are likewise seeking resolution of these questions of federal statutory interpretation. See, e.g., *People* v. *Einhorn*, 45 A.D. 2d 75, 356 N.Y.S. 2d 620 (1974). Thus, quite literally, every court in the nation is concerned with a definitive resolution of these issues.

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the administration of justice throughout the nation cannot be underestimated.

Finally, this case presents the issue in the crispest possible terms. The government has admitted the existence of electronic surveillance, and that its questioning is predicated on it. The witness has asserted his statutory rights to test the legality of that surveillance in defense to a civil contempt proceeding. What those rights are is an issue which should be decided by this Court and should be decided now.

CONCLUSION

For the reasons set forth above as well as those contained in the petition for a writ of certiorari, petitioners pray that this Court grant rehearing on the order of denial, vacate that order, grant the petition and review the judgments and opinion below.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioners, I hereby certify that this petition for re-hearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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Counsel for Petitioners